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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| In re ROBERT J., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROBERT J.,<br><br>Defendant and Appellant. | G045231<br><br>(Super. Ct. No. DL039218)<br><br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Nick Dourbetas, Judge. Reversed and remanded with directions.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Christine Levingston Bergman, Deputy Attorney General, for Plaintiff and Respondent.

* * *

## INTRODUCTION

The juvenile court found true allegations that Robert J. committed arson. On appeal, we conclude there was sufficient evidence that Robert acted with malice in igniting a paper towel in a boys' bathroom at his school. We further conclude the juvenile court failed to consider Robert's age when it determined a police officer's questioning of Robert was not a custodial interrogation. Because Robert's responses to that questioning constituted the evidence of malice, we reverse and remand for the juvenile court to reconsider Robert's motion to suppress his statements. If, on remand, the motion to suppress is granted, the petition against Robert shall be dismissed. If, however, the motion is again denied, the disposition order shall be reinstated.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

Around 11:00 a.m. on January 3, 2011, a fire started in the boys' bathroom inside the gymnasium at a middle school in Orange County. A physical education teacher, Bryan Stahl, was alerted to the fire by two boys who told him they smelled smoke. Stahl entered the bathroom, and saw a flame inside the paper towel dispenser. Stahl was able to put out the fire with the use of a fire extinguisher.

Police Officer Jennifer Marlatt interviewed four students at the school regarding the fire, including Robert, then 13 years of age. Marlatt interviewed Robert in the principal's office; the principal and another officer were present while the interview took place. Both officers were carrying loaded firearms, tasers, and batons, but never drew their weapons. The principal brought Robert into her office at Marlatt's request. The door was closed, but not locked, while the interview took place. Marlatt and Robert

were seated in chairs facing the principal's desk, while the principal was seated behind her desk and the other officer was seated by the door.

Marlatt never told Robert that he was required to speak to her, that he could not leave the office, or that he was under arrest. Nor did she tell Robert that he was free to leave or that he was not under arrest. The interview lasted about 10 minutes. At the time she interviewed Robert, Marlatt had a good idea how the fire started, and that Robert had started the fire. All the evidence she had pointed to Robert as the culprit, and one eyewitness had identified Robert.

Marlatt first asked Robert if he knew why he was there, and Robert said, "the fire." A school official had earlier rounded up a group of students and given them a speech regarding "a fire"; Marlatt admitted Robert's statement did not indicate his culpability. Robert denied starting the fire. He admitted he found a white Bic lighter in the school parking lot that morning, and stated that he had been in the gym when he saw smoke coming from the bathroom. When Marlatt showed Robert a lighter she had received from the principal, he admitted that was the lighter he had found.

Marlatt told Robert other students had seen him set the fire, there were cameras in the boys' bathroom, and Robert's fingerprints were found on the lighter. Marlatt then told Robert to stop lying. After about eight seconds of silence, Robert said he set the fire out of curiosity. Robert told Marlatt he saw a small portion of a paper towel hanging down from the dispenser, and thought if he lit it, the paper would fall to the ground. However, a larger portion of the paper towel fell to the ground, the flame went up inside the dispenser, and smoke started to come out of it. Robert and a friend tried to put the fire out with water from the sink. When they could not see a flame, they thought the fire was out. Robert and his friend then went into the gym, where Robert left the lighter on the stage. Robert told Marlatt he knew setting the fire was wrong.

Another student, J.W., testified for the defense that he entered the bathroom and saw flames in a paper towel dispenser. J.W. also saw Robert and two other students

trying to put out the fire by getting water from the sink and splashing it onto the dispenser. J.W. later saw Robert throw away a lighter in the gym.

The district attorney filed a petition under Welfare and Institutions Code section 602, charging Robert with arson. (Pen. Code, § 451, subd. (c).) After a contested jurisdictional hearing, the juvenile court sustained the petition and found the allegations true beyond a reasonable doubt. At the dispositional hearing, Robert was declared a ward of the court, and placed on supervised probation. Robert timely appealed.

## DISCUSSION

### I.

### *SUFFICIENCY OF THE EVIDENCE*

Robert argues there was insufficient evidence he lit the fire with malice, as required to prove a violation of Penal Code section 451.[1] Our holding in this case is governed by *In re V.V.* (2011) 51 Cal.4th 1020, 1023, in which the California Supreme Court concluded the "acts of intentionally igniting and throwing a firecracker amid dry brush on a hillside, *although done without intent to cause a fire or other harm*, were sufficient to establish the requisite malice for arson." (Italics added.) The court further held, "[i]n determining whether the second type of malice ('intent to do a wrongful act') is established for arson, malice will be presumed or implied from the deliberate and intentional ignition or act of setting a fire without a legal justification, excuse, or claim of right. [Citations.]" (*Id.* at p. 1028.)

The evidence establishes that Robert deliberately and intentionally ignited a fire without a legal justification, excuse, or claim of right. Officer Marlatt testified Robert stated that, having found a lighter in the school parking lot, he lit a small portion

[1] "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (Pen. Code, § 451.)

of a paper towel hanging down from the paper towel dispenser in the boys' bathroom. Robert also stated, and another student confirmed, that Robert tried to put out the flames, and that he threw the lighter away in the gym after leaving the bathroom.

There was sufficient evidence that Robert had the necessary mens rea for the crime of arson.

## II.

## MIRANDA V. ARIZONA *(1966) 384 U.S. 436*

Robert moved to suppress his statements to Officer Marlatt, on the grounds he was in custody at the time, but had not been read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Law enforcement officers "are not required to administer *Miranda* warnings to everyone whom they question." (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) Rather, law enforcement officers are required to administer *Miranda* advisements only to those subject to custodial interrogation: "'Absent "custodial interrogation," *Miranda* simply does not come into play.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) For purposes of *Miranda*, a person is in custody when there is "'a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citation.]" (*Thompson v. Keohane* (1995) 516 U.S. 99, 112; accord, *People v. Ochoa*, *supra*, at p. 401.)

"Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] The totality of the circumstances surrounding an incident must be considered as a whole. [Citation.] Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the

questioning.' [Citation.] Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation.]" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404, fn. omitted.)

In *J.D.B. v. North Carolina* (2011) ___ U.S. ___, ___ [131 S.Ct. 2394, 2398-2399], the United States Supreme Court held that the age of a child subjected to police questioning is relevant to the analysis of whether the interrogation was custodial. In that case, a uniformed police officer removed the juvenile, who was 13 years old, from his seventh grade classroom, and an investigator questioned him in a closed-door conference room; two school officials were also present. (*Id.* at p. ___ [131 S.Ct. at p. 2399].) The juvenile was not read his *Miranda* rights, was not permitted to speak with his legal guardian, and was not informed he was free to leave the conference room. (*Id.* at p. ___ [131 S.Ct. at p. 2399].) After being questioned for 30 to 45 minutes, the juvenile confessed to a series of break-ins. (*Id.* at p. ___ [131 S.Ct. at pp. 2399-2400].) The trial court denied a motion to suppress the juvenile's confession, ruling that the questioning did not amount to a custodial interrogation. (*Id.* at p. ___ [131 S.Ct. at p. 2400].)

The Supreme Court reversed. "Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. [Citations.] It is, however, a reality that courts cannot simply ignore." (*J.D.B. v. North*

*Carolina, supra,* ___ U.S. at p. ___ [131 S.Ct. at p. 2406], fn. omitted.) Because the juvenile's age had not been considered as part of the custodial interrogation analysis, the Supreme Court remanded the matter back to the trial court. (*Id.* at p. ___ [131 S.Ct. at p. 2408].)

Here, in opposing the motion to suppress, the prosecutor argued, in part: "And, again, to [Robert's] age, the Supreme Court has been very clear—and [as] recently as in 2004—that this is an objective standard. In *Yarborough vs. Alvarez*, the United States Supreme Court held that subjective characteristics of the individuals are not considered, and they specifically cited to age and experience of law enforcement." (Italics added.) Immediately after the prosecutor concluded his argument, the juvenile court denied the motion. The only fair inference we can draw from this exchange is that the juvenile court did not consider Robert's age when determining the interrogation was not custodial. Pursuant to *J.D.B. v. North Carolina*, this was error. We remand to allow the juvenile court to reconsider the motion to suppress, with due consideration given to Robert's age and lack of previous experience with law enforcement, in addition to all the other factors listed *ante*. The weight and relevance of any one of those factors may be different from when the court initially denied the motion to suppress, because the significance of Robert's age may have a bearing on them.

If the juvenile court determines that the motion to suppress should be granted, then there is insufficient evidence supporting Robert's adjudication, as the only evidence of malice was the statements made by Robert during his interrogation. In that event, the petition must be dismissed.

## DISPOSITION

The disposition order is reversed and the matter is remanded with directions to hold a new hearing on the minor's motion to suppress. If the juvenile court again

denies the motion to suppress, the original disposition order shall be reinstated. If the court grants the motion to suppress, the petition shall be dismissed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.